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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL ALLEN STAUB,

11 Plaintiff,

12 v.

13 ZIMMER, INC.,

14 Defendant.

CASE NO. C17-0508JLR

ORDER GRANTING MOTION
TO DISMISS

15 **I. INTRODUCTION**

16 Before the court is Defendant Zimmer, Inc.'s ("Zimmer") Federal Rule of Civil
17 Procedure 12(b)(6) motion to dismiss for failure to state a claim. (Mot. (Dkt. # 10).) The
18 court has considered the parties' submissions, the relevant portions of the record, and the
19 applicable law. Being fully advised,¹ the court GRANTS the motion to dismiss with
20 leave to amend.

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22 ¹ No party has requested oral argument, and the court deems it unnecessary to the
disposition of this motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

II. BACKGROUND

On December 30, 2016, Plaintiff Michael A. Staub filed a state court product liability action against Zimmer. (*See* Compl. (Dkt. # 3-1).) Mr. Staub alleges that he “underwent hip arthroplasty” on December 4, 2013. (*Id.* ¶ 3.) He further alleges that his surgeon implanted Zimmer’s product, an “ML Taper,” at the time of surgery. (*See id.* ¶ 4.) Mr. Staub contends that the ML Taper is “defective and unreasonably dangerous as defined by applicable Washington law” and that Zimmer has recalled the product. (*Id.* ¶¶ 5-6.) He also asserts that he “was required to undergo revision surgery” due to the defective nature of the ML Taper. (*Id.* ¶ 7.) Finally, Mr. Staub states that he suffered general and special damages “[a]s a direct and proximate result of the defective nature of [Zimmer’s] product.” (*Id.* ¶ 8.)

Zimmer removed the action to this court on April 3, 2017. (*See* Not. of Rem. (Dkt. # 1, as amended by Dkt. # 3).) On April 4, 2017, Zimmer filed a motion to dismiss the action for failure to state a claim. (*See* Mot.) Zimmer noted its motion for the court’s consideration on May 5, 2017. (*Id.* at 1.) Under the Local Rules for the Western District of Washington, Mr. Staub’s opposition papers were due on Monday, May 1, 2017. *See* Local Rules W.D. Wash. CR 7(d)(3) (“Any opposition papers shall be filed and served not later than the Monday before the noting date.”). Zimmer filed a reply memorandum on May 5, 2017, noting Mr. Staub’s failure to timely respond to the motion to dismiss. (*See* Reply (Dkt. # 12).) Later that day, Mr. Staub filed a response opposing Zimmer’s motion to dismiss, but offering no excuse for his admitted lack of timeliness or his failure

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1 to move for an extension of time.² (See Resp. (Dkt. # 13) at 1 (“Plaintiff’s counsel
2 apologizes to the Court for his failure to timely respond to this Motion. No excuse is
3 offered, for whatever reason, the ECF email containing Defendant’s Motion was
4 overlooked.”).)

5 **III. ANALYSIS**

6 **A. Standard**

7 When considering a motion to dismiss under Rule 12(b)(6), the court construes the
8 complaint in the light most favorable to the nonmoving party. *Livid Holdings, Ltd. v.*
9 *Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept
10 all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.
11 *Wyer Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To
12 survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
13 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556
14 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
15 court may dismiss a complaint as a matter of law if it lacks a cognizable legal theory or
16 states insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police*

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19 ² The court will consider Mr. Staub’s untimely response because there is no prejudice to
20 Zimmer in this instance. The court cautions Mr. Staub’s counsel, however, to adhere to both the
21 Federal Rules of Civil Procedure and the court’s Local Rules in the future. When a deadline has
22 expired, the Federal Rule of Civil Procedure 6(b) requires the delinquent party to file a motion
seeking an extension of the deadline and to demonstrate “excusable neglect.” See Fed. R. Civ. P.
6(b). Counsel’s failure to abide by this Rule in the future may lead the court to strike a
delinquent filing.

1 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749
2 F.2d 530, 534 (9th Cir. 1984).

3 The court need not accept as true a legal conclusion presented as a factual
4 allegation. *Iqbal*, 556 U.S. at 678. Although Federal Rule of Civil Procedure 8 does not
5 require “detailed factual allegations,” it demands more than “an unadorned,
6 the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Twombly*, 550 U.S. at 555).
7 A pleading that offers only “labels and conclusions or a formulaic recitation of the
8 elements of a cause of action” will not survive a motion to dismiss under Federal Rule of
9 Civil Procedure 12(b)(6). *Id.*

10 **B. Washington Product Liability Act**

11 The Washington Product Liability Act (“WPLA”), RCW ch. 7.72, “created a
12 single cause of action for product-related harms and supplants previously existing
13 common law remedies, including common law actions for negligence.” *Wash. State*
14 *Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 858 P.2d 1054, 1067 (Wash. 1993).
15 Under the WPLA, “[a] product manufacturer is subject to liability to a claimant if the
16 claimant’s harm was proximately caused by the negligence of the manufacturer in that
17 the product was not reasonably safe as designed or not reasonably safe because adequate
18 warnings or instructions were not provided.” RCW 7.72.030(1). Further, “[a] product
19 manufacturer is subject to strict liability to a claimant if the claimant’s harm was
20 proximately caused by the fact that the product was not reasonably safe in construction or
21 not reasonably safe because it did not conform to the manufacturer’s express warranty or
22 to the implied warranties under Title 62A RCW.” RCW 7.72.030(2). Thus, to state a

1 claim under the WPLA, a plaintiff must plead non-conclusory allegations that plausibly
2 support (1) a defective design claim; (2) a failure to warn claim; (3) a defective
3 manufacture claim; or (4) a breach of express or implied warranty claim. RCW 7.72.030;
4 *see* 16A David K. DeWolf & Keller W. Allen, *Wash. Prac., Tort L. & Prac.* § 17:8 (4th
5 ed. 2013). A plaintiff need not commit at the outset to one of these specific theories of
6 liability prior to conducting discovery. *See Braden v. Tornier, Inc.*, No. C09-5529RJB,
7 2009 WL 3188075, at *3 (W.D. Wash. Sept. 30, 2009). However, in order to survive a
8 motion to dismiss the complaint must contain sufficient non-conclusory factual
9 allegations to support at least one avenue of relief, *see Lucas v. City of Visalia*, 726 F.
10 Supp. 2d 1149, 1155 (E.D. Cal. 2010) (“The problem with the allegation is that it simply
11 tracks the general elements of strict products liability and contains no pertinent factual
12 allegations.”). The court now examines the adequacy of Mr. Staub’s allegations as to
13 each product liability claim.

14 1. Failure to Warn and Breach of Warranty

15 The complaint contains no allegations regarding either a failure to warn claim³ or
16 an express or implied breach of warranty claim. (*See generally* Compl.) The court “will
17 not presume to raise a claim that plaintiff failed to allege.” *Laisure-Radke v. Par Pharm.,*
18 *Inc.*, 426 F. Supp. 2d 1163, 1170 (W.D. Wash. 2006) (declining to read into a plaintiff’s
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20 ³ Additionally, unless Mr. Staub alleges that Zimmer failed to adequately warn the
21 medical provider of the product’s unsafe nature, such a claim may be precluded by the learned
22 intermediary doctrine, because a medical device manufacturer’s duty to warn generally flows to
the medical practitioner, and not the end user. *See Taylor v. Intuitive Surgical, Inc.*, 389 P.3d
517, 524, 526 (Wash. 2017).

1 complaint under the WPLA a claim for breach of the implied warranty of merchantability
2 when the plaintiff fails to allege such a claim); *see Lucas*, 726 F. Supp. 2d at 1156, n.1
3 (“As the Court reads the tenth cause of action, the Court sees only a claim for
4 manufacturing and design defects. . . . If [the plaintiff] intends to allege a strict liability
5 claim for inadequate warnings, . . . then he should amend the tenth cause of action to
6 expressly include that claim.”).

7 2. Design Defect Claim

8 Under the WPLA, a design defect claim can be based upon either a “risk utility
9 test” theory or a “consumer expectations test” theory. *See, e.g., Kirkland v. Emhart Glass*
10 *S.A.*, 805 F. Supp. 2d 1072, 1080 (W.D. Wash. 2011); *Falk v. Keene Corp.*, 782 P.2d 974,
11 980 (Wash. 1989). Under the risk utility test theory, the plaintiff may prevail by proving
12 that, “at the time of manufacture, the likelihood that the product would cause the
13 plaintiff’s harm or similar harms, and the seriousness of those harms, outweighs the
14 manufacturer’s burden to design a product that would have prevented those harms and
15 any adverse effect a practical, feasible alternative design would have on the product’s
16 usefulness.” *Falk*, 782 P.2d at 980 (citing RCW 7.72.030(1)(a)). Alternatively, under the
17 consumer expectations test theory, the plaintiff may prove the defendant’s liability by
18 showing the product was unsafe to an extent beyond that which the ordinary consumer
19 would contemplate. *Id.* (citing RCW 7.72.030(3)).

20 Mr. Staub’s risk utility test theory is based on the conclusory allegation that
21 “Tornier designed, manufactured, marketed, and sold a product that was not reasonably
22 safe.” (*See* Compl. ¶ 9.) Mr. Staub fails to allege any design elements that led to the

1 alleged harm, facts indicating that there was a feasible alternative design element, or facts
2 indicating that the burden of implementing the alternative design would not have
3 outweighed the reduction in harm. (*See generally* Compl.)

4 In *Lucas*, the plaintiff alleged that Taser International, Inc.’s (“Taser”) eponymous
5 product “contained design and/or manufacture defects.” *Lucas*, 726 F. Supp. 2d at 1155.
6 Although the plaintiff’s allegations “track[ed] the general elements of strict products
7 liability,” his claim “contain[ed] no pertinent factual allegations.” *Id.* The court
8 dismissed the cause of action without prejudice because it “contain[ed] no factual
9 allegations that identify what aspect of the [product’s] design and manufacture made it
10 defective.” *Id.* at 1155-56. Although *Lucas* applied the product liability law of
11 California, the court based its dismissal was based upon the same procedural rule in this
12 case—the pleading requirements of Rule 8(d). *Id.* at 1159.⁴

13 Mr. Staub’s consumer expectation test theory likewise is based on a single
14 conclusory allegation. (*See generally* Compl.) Specifically, Mr. Staub alleges that
15 “Tornier designed, manufactured, marketed, and sold a product that . . . failed to meet
16 consumer expectations of safety.” (*Id.* ¶ 9.) Mr. Staub fails to allege how the product
17 failed to meet a consumer’s expectations of safety or what those expectations are. (*See*
18 *generally id.*) Under the consumer expectations test, the court in *Lucas* held that

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20 ⁴ In a case applying Washington law involving the same product and defendant as in
21 *Lucas*, the court found the bare allegation that the defendant “defectively manufactured” the
22 products to be conclusory. *Manjares v. Taser Int’l, Inc.*, No. CV-12-3086-LRS, 2012 WL
5389688, at *2 (E.D. Wash. Nov. 2, 2012).

1 the plaintiff “should describe *how* the [product] failed to meet the minimum safety
2 expectations of an ordinary consumer.” *Lucas*, 726 F. Supp. 2d at 1159 (quoting *Altman*
3 *v. HO Sports Co., Inc.*, No. 1:09-CV-1000 AWI SMS, 2009 WL 4163512 at *8 (E.D.
4 Cal. Nov. 23, 2009)). In *Altman* the court considered the plaintiff’s allegation that the
5 products in question “d[id] not meet consumer expectations” a bare legal conclusion and
6 insufficient to meet the pleading requirements of Federal Rule of Civil Procedure 8.
7 *Altman*, 2009 WL 4163512, at *8. Likewise, Mr. Staub’s bare legal conclusion does not
8 nudge his claim “across the line from conceivable to plausible.” *See Iqbal*, 556 U.S. 662,
9 680.

10 3. Manufacturing Defect Claim

11 A plaintiff may prevail on a manufacturing defect claim by proving that when a
12 product left the control of the manufacturer the product deviated in some material way
13 from the design specifications or performance standards of the manufacturer, or deviated
14 in some material way from otherwise identical units of the same product line, or from
15 ostensibly identical units of the same product line, and that the defects proximately
16 caused the plaintiff’s harm. RCW 7.72.030(2)(a). Mr. Staub has failed to identify or
17 explain how the product deviated from the intended result or design, or from other
18 seemingly identical models. (*See generally* Compl.) The complaint merely alleges that
19 the product “was defective and unreasonably dangerous as defined by applicable
20 Washington law.”⁵ (*Id.* ¶ 5.) Such conclusory allegations are insufficient under *Iqbal*.

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22 ⁵ Mr. Staub also alleges that Zimmer “voluntarily recalled” the ML Taper, but fails to
allege any connection between this recall and his alleged injuries. (*See* Compl. ¶ 6.)

1 556 U.S. 662, 680. In a recent Washington case involving a product similar to the one at
2 issue here, the court found such conclusory allegations insufficient to state a claim under
3 the WPLA. *See Force v. Wright. Med. Tech., Inc.*, No. C12-5687RBL, 2012 WL
4 4897165, at *2 (W.D. Wash. Oct. 15, 2012). The *Force* court specifically cited as
5 insufficient and conclusory allegations that certain hip devices “were defective in their
6 manufacture and construction” or that the devices “were in a dangerous and defective
7 condition.” *Id.* The *Force* court, having disregarded the plaintiffs conclusory allegations,
8 found that “[s]imply alleging that Defendants manufacture the product that failed in
9 [Plaintiff’s] left side does not create a plausible claim.” *Id.*

10 Here, Mr. Staub alleges little more than the plaintiff in *Force*. (*See generally*
11 Compl.) “*Twombly* and *Iqbal* do not set a high bar, but they do require more” than Mr.
12 Staub provides. *See Force*, 2012 WL 4897165 at *2 (holding that where the complaint
13 “fails to allege any specifics about the alleged defect, how the product deviated from
14 requirements, what about it was dangerous, or what about the warnings were inadequate
15 . . . , [p]laintiffs fail to properly plead their product liability claims”). Therefore, the
16 court concludes that Mr. Staub fails to properly plead a manufacturing defect claim, and
17 the court grants Zimmer’s motion to dismiss.

18 **C. Leave to Amend**

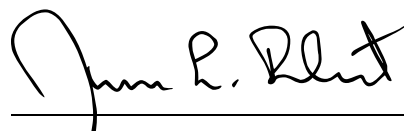
19 Even though Mr. Staub’s complaint is inadequate, dismissal with prejudice is not
20 the proper remedy. If a claim is based on a proper legal theory but fails to allege
21 sufficient facts, the plaintiff should be afforded the opportunity to amend the complaint
22 before dismissal. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir.1983). “Dismissal

1 without leave to amend is improper unless it is clear, upon *de novo* review, that the
2 complaint could not be saved by any amendment.” *Moss v. U.S. Secret Serv.*, 572 F.3d
3 962, 969 (9th Cir. 2009). In determining whether dismissal without leave to amend is
4 appropriate, courts also consider such factors as “undue delay, bad faith or dilatory
5 motive on the part of the movant, repeated failure to cure deficiencies by amendments
6 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
7 amendment, and futility of amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).
8 Plaintiffs have not exhibited undue delay or bad faith, Zimmer is at little risk of prejudice
9 because discovery has yet to begin, and the court cannot say at this stage that amendment
10 would be futile. *See Force*, 2012 WL 4897165, at *3.

11 IV. CONCLUSION

12 The court GRANTS Zimmer’s motion to dismiss (Dkt. # 10) and GRANTS Mr.
13 Staub leave to amend his complaint. Mr. Staub’s amended complaint, if any, must
14 correct the deficiencies described herein and must be filed and served no later than
15 twenty (20) days from the entry of this order. The court warns Mr. Staub that failure to
16 timely file an amended complaint that adequately pleads his claims may result in the
17 court dismissing his action with prejudice.

18 Dated this 9th day of June, 2017.

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21 JAMES L. ROBART
22 United States District Judge